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NO. 17

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

FORD MOTOR COMPANY,
Petitioner

vs.

TOM L. BEAUCHAMP, SECRETARY OF STATE OF THE STATE OF TEXAS, ET AL.,
Respondents

BRIEF OF RESPONDENTS

GERALD C. MANN,
Attorney General of Texas

GLENN R. LEWIS,
Assistant Attorney General

W. F. MOORE,
First Assistant Attorney General

Attorneys for Respondents.

FIRM FOUNDATION, AUSTIN

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PRELIMINARY STATEMENT

The petitioner, Ford Motor Company, brought this suit against the Secretary of State, the Attorney General of Texas, and the State Treasurer to recover the sum of $7,529.25, which is that amount or portion of the state franchise tax for the year 1936 which it had paid to the State of Texas under protest.

Petitioner filed its suit at law in the District Court of the United States for the Western District of Texas, Austin Division. Suit was brought pursuant to the Acts of the Forty-Third Legislature, State of Texas, Chapter 214, page 637, known as

the Suspension Statute, which provides, in effect, that a franchise tax paid to the State of Texas under protest may be recovered back by a proper suit, if such tax has been illegally assessed and paid to the State.

As shown by the Texas statutes, and as disclosed by the petition of the Ford Motor Company, the tax in question is a franchise or privilege tax levied against petitioner as a corporation doing business in the State of Texas under a lawful permit theretofore granted to it, and by virtue of Articles 7084 and 7085, Revised Civil Statutes of the State of Texas, 1925, as amended by the Acts of the Forty-second Legislature, Chapter 265, p. 441. So much of this statute as provides for the assessment of such tax as is deemed pertinent is here quoted, to-wit:

> "(A) Except as herein provided, every domestic and foreign corporation heretofore or hereafter chartered or authorized to do business in Texas, shall, on or before May 1st of each year, pay in advance to the Secretary of State a franchise tax for the year following, based upon that proportion of the outstanding capital stock, surplus and undivided profits, plus the amount of outstanding bonds, notes and debentures, other than those maturing in less than a year from date of issue, as the gross receipts from its business done in Texas bears to the total gross receipts of the corporation from its entire business, which tax shall be computed at the following rates for each One Thousand Dollars ($1,000.00) or fractional part thereof; One

Dollar ($1.00) to One Million Dollars ($1,000,000.00), sixty cents (60c); in excess of One Million Dollars ($1,000,000.00), thirty cents (30c); provided that such tax shall not be less than Ten Dollars ($10.00) in the case of any corporation, including those without capital stock. Where a foreign corporation applying for a permit has heretofore done no business in Texas, such tax shall not be payable until the end of one year from the date of such permit, at which time the tax shall be computed according to first year's business; and, at the same time, such corporation shall also pay its tax in advance, based upon the first year's business, for the period from the end of the first year to and including May 1st following. In all other cases the tax shall be computed from the data contained in the reports required by Articles 7087 and 7089." Capital stock as applied to corporations without capital stock shall mean the net assets."

Article 7089, Revised Civil Statutes of Texas, 1925, as amended by the Acts of the Forty-second Legislature of the State of Texas, Chapter 265, Section 2, p. 441, provides that all corporations now required to pay an annual franchise tax shall, between January 1st and March 15th of each year, make a sworn report to the Secretary of State, on blanks furnished by that officer, showing the condition of such corporation on the first day of its preceding fiscal year. The further requirements of this statute are omitted, as the report so required by the statute was complied with by the Ford Motor Company, and its provisions are of no further concern in this cause.

Article 7091, Revised Civil Statutes of Texas, 1925, provides for a penalty of 25% for failure to pay such franchise tax when due, and, further, that if the amount of the tax and penalty be not paid in full on or before the first day of July thereafter such corporation shall for such default forfeit the right to do business in said State; such forfeiture to be accomplished without judicial ascertainment by the Secretary of State writing upon the margin of the record kept in his office the words, "The right to do business forfeited and the date of such forfeiture."

The character of business transacted by the Ford Motor Company in the State of Texas is shown by Paragraph 11 of its petition, which is as follows:

> "Plaintiff transacted business in the State of Texas during the whole of its fiscal year 1935, which ended December 31, 1935, and ever since said time and up to and including the date of this petition has continued so to transact its business and intends and expects in the future so to do.
>
> "In brief, plaintiff's Texas business is conducted in the following way: Plaintiff owns and operates within the State of Texas assembly plants. No parts for the self-propelled motor vehicles sold by plaintiff are manufactured at said assembly plant or at any other point within the State of Texas. All of said parts are manufactured at plants outside of the State of Texas, located for the most part in the State of Michigan. The manufactured parts are shipped from Michigan and other points outside of the State of Texas to plaintiff's assembly plants in Texas, and are there assembled, or put together into

finished self-propelled motor vehicles. The assembled vehicles are then sold in intrastate commerce to various dealers, who in turn sell said vehicles to the public. Some of the vehicles assembled at the Texas plants are sold in interstate commerce, but by far the biggest part thereof is sold, as aforesaid, to Texas dealers in intrastate commerce.

"During the year 1935 approximately 60,000 motor vehicles were assembled by plaintiff at its assembly plants in Texas in the manner outlined above. In some few instances completed motor vehicles are shipped into Texas from points outside this State and sold in intrastate commerce. During the year 1935 approximately 700 such units were thus sold in Texas. In addition thereto, Ford Motor Company annually ships into Texas and sells to its various dealers in intrastate commerce many thousands of dollars worth of motor vehicles and tractor parts and accessories, all of which are manufactured without the State of Texas, for the most part, in the State of Michigan." (Tr. pp. 4-5.)

The statistical data of the business of the Ford Motor Company in the State of Texas for the year 1935, as shown by its report to the Secretary of State, and as alleged in its petition, is as follows:

1. Gross receipts of business done in Texas $34,272,887.72.

2. Gross receipts of business done outside of Texas $854,072,087.75.

3. Total gross receipts from all business done both in and outside of Texas $888,344,075.47.

4. Ratio of receipts from business done in Texas to total gross receipts 3.8580606%.

5. Total capital at December 31, 1935, $600,242,-151.57.

6. Value of its invested capital in Texas properties $3,079,417.96.

7. Capital allocated to Texas by the formula as prescribed in the franchise tax statute $23,157,-705.95.

The amount of the total franchise tax due by the Ford Motor Company to the State of Texas for the year 1936, without penalty, amounted to $7,247.40, when computed according to the statutory formula, and as shown by the company's report to the Secretary of State, and as disclosed in plaintiff's petition. (Tr. pp. 8 and 16.)

Petitioner enclosed with its report to the Secretary of State its certified check for $1,224.00, which it asserted was the amount it owed as its franchise tax for the year 1936, and which amount was arrived at by multiplying 3.8589606% of the total of all of its business done during the year 1935 into the amount of its capital which was invested by it in the State of Texas, that is, into $3,079,417.96. (See Paragraph 18 of Plaintiff's Petition, Tr. p. 8.)

The Secretary of State credited the amount of this check on the franchise tax due by the Ford Motor Company for said year, and notified said company that the amount of the tax demanded, without the penalty, was $7,247.40, and petitioner having refused to pay the same within the time required, a penalty of 25% was added to the tax.

It is believed that the gravamen of the petitioner's charge that the franchise tax was illegally laid against it, and that the Texas statute is void, as being in contravention of the Federal Constitution, is set forth in Paragraph 22 of its petition, which is as follows:

> "In the light of the facts and as applied to plaintiff, the formula provided by statute for ascertaining the amount of taxable capital in Texas upon which franchise taxes for foreign corporations are based is arbitrary, unreasonable, whimsical and capricious, and results in the State levying a tax on capital and assets used by plaintiff in its interstate business and in the State of Texas levying a tax upon property outside the confines of the State of Texas, all of which constitutes an unreasonable and arbitrary burden upon interstate and foreign commerce in violation of the provisions of Article I, Section 8, of the provisions of the Constitution of the United States vesting in the Congress of the United States the power to regulate commerce with foreign nations and among the several States, and likewise operates to deprive plaintiff of its property without due process of law, in violation of the provisions of the Fourteenth Amendment of the Constitution of the

United States, which provides that no state shall deprive any person of his property without due process of law, nor that the requirement that plaintiff pay a franchise tax to the State of Texas calculated on the formula set up by statute results in plaintiff being required to pay a tax on property neither located nor used within the State of Texas, and a tax upon property used by plaintiff in its interstate and foreign commerce. Much of plaintiff's property located outside of the State of Texas is used in interstate and foreign commerce." (Tr. pp. 12-13.)

It was alleged in Paragraph 23 of said petition that plaintiff's business was largely that of a manufacturer of automobiles, tractors and parts, and that its manufacturing plants are located outside of Texas and in Michigan; that its capital and surplus are represented to a large extent in manufacturing plants, and that much of its personal property consisting of investments in various securities has a taxable situs in Michigan; that the total value of its capital and surplus which were represented by its total assets amounted to $600,242,151.57, of which $504,111,209.10 are located in Michigan. It was further alleged that the effect of applying the statutory formula was "to allocate to Texas capital and surplus of a value largely in excess of the actual value of plaintiff's capital and surplus located in Texas, and results in creating deficiencies in locations in other States, principally in Michigan, of capital and surplus assets represented in those States", in that such formula would have allocated to Michigan of its capital stock only the sum of $190,536,153.33, whereas, its assets so actually located

in that State amounted to the sum of $504,111,209.10; that "What is true of plaintiff is necessarily true of any large manufacturing concern which manufactures in one state but distributes in others, including Texas, in that business is done when sales are made, but the work, labor and processing which necessarily precede the making of sales is done at the place of manufacture"; and, therefore, "that Texas taxes plaintiff's property actually located in Michigan and states other than Texas, on the theory that a certain arbitrary percentage of plaintiff's property representing the value of its capital and surplus is actually located in Texas, whereas this theory has no support in fact."

Petitioner prayed for recovery of the said sum of $7,529.25 so paid to the Secretary of State by plaintiff under protest, that being the amount of the franchise tax and penalty laid against it, less the amount previously paid by petitioner.

There is no allegation in the plaintiff's petition that the $34,272,887.72 gross receipts from plaintiff's business done in Texas for the year in question was in any part derived from other than intrastate business.

RESPONDENT'S COUNTER-PROPOSITIONS TO THE PETITIONER'S SPECIFICATIONS OF ERROR

1.

The District Court properly sustained the general demurrer to plaintiff's petition, for the

reason that no facts were alleged therein which showed that the application of the Texas Franchise Statute to petitioner's business for the year in question constituted a direct burden on interstate commerce, or deprived plaintiff of its property without due process of law, and the Circuit Court of Appeals did not err in so holding.

2.

The Circuit Court of Appeals did not err in holding that the State of Texas may constitutionally measure the value of the annual privilege extended to foreign corporations to transact business in Texas in relation to capital employed and activities conducted by said corporations beyond the confines of the States, when they are considered solely in connection with the use made of such capital and the business conducted by it in the State of Texas.

3.

The Circuit Court of Appeals did not err in holding that the Texas statute apportioned capital on the basis of business done by petitioner in said State.

4.

The Circuit Court of Appeals did not err in holding that the State statute, as applied to the petitioner for the taxable year in question, did

not result in the State of Texas laying a tax on petitioner's property beyond the power of the State to tax, contrary to the due process clause of the Fourteenth Amendment to the Constitution of the United States.

5.

The Circuit Court of Appeals did not err in holding that the plaintiff's petition failed to allege sufficient facts to show that, as applied to petitioner, the Texas statute operated as an unreasonable and arbitrary burden upon interstate and foreign commerce in violation of Article I, Section 8, of the Constitution of the United States.

STATEMENT

The above five counter-propositions are closely related, and they will be discussed together.

The preliminary statement is adopted as the statement under said propositions.

I.

THE AUTHORITIES CITED BY PETITIONER IN ITS BRIEF DO NOT SUPPORT ITS POSITION

The respondents submit that the authorities cited by the petitioner do not support any of the petitioner's various expositions of error, when such authori-

ties are analyzed in connection with the provisions of the Texas statute. In this connection it is deemed proper to here repeat the language of this Court in the case of *Colgate* v. *Harvey*, 296 U. S. 404, 80 L. Ed. 299, which was concerned with the income tax law of the State of Vermont. The Court said:

> "The boundary between what is permissible and what is forbidden by the constitutional requirement has never been precisely fixed and is incapable of exact delimitation. In the great variety of cases which have arisen, decisions may seem difficult of reconcilement; but investigation will generally cause apparent conflicts to disappear when due weight is given to material circumstances which distinguish the cases. If the evident intent and general operation of the tax legislation is to adjust the burden *with a fair and reasonable degree of equality*, the constitutional requirement is satisfied." (Italics ours.)

It is apparent that the petitioner places great reliance upon the case of *Western Union Telegraph Company* v. *Kansas*, 216 U. S. 1, 54 L. Ed. 255. The Court in that case held that if the statute there under attack and as reasonably interpreted did directly, or by its necessary operation burden interstate commerce, it must be held to be invalid; and that the Court would not regard the mere form, but would look through that to the substance of things in order to determine the nature and application of the tax to the facts. Those expressions of the Court, however, may only be properly applied when considered in connection with this fur-

ther statement of the Court, viz., "That an interstate carrier, entering a state for purposes of its business, is subject to local regulations that in their intent and purpose only incidentally affect interstate commerce, but are established in good faith."

The Kansas statute differed substantially from the present Texas statute in that the Kansas statute provided in substance that each corporation, before filing its charter with the Secretary of State, should pay to the State Treasurer of that State, for the benefit of the permanent school fund, a charter fee based upon a stated percentage of "its authorized capital, wherever employed." The difference in the text and meaning of the Kansas statute as compared with the Texas statute is at once apparent, for the Kansas tax, as stated in substance by the Court, was laid upon the *authorized* capital of the company regardless of what may have been the percentage of its properties and business in Kansas as compared to its total capital and business both in and out of that State. The tax was, therefore, considered by the Court to be purely arbitrary and a direct burden upon the company's interstate business, and that the tax plainly was not based upon such of the company's capital stock as was represented in its local business and property in Kansas.

The Court in that case distinguished its decision from the case of *Western Union Telegraph Company* v. *Attorney General of Massachusetts*, 125 U. S. 530, 31 L. Ed. 790, and in so doing said, "A tax nominally upon the shares of the company was held in

effect a tax only on property owned and used by the company *in Massachusetts*, because and *only because*, the basis established for the ascertainment of the value of such property was *the proportion of the company's lines in the State to their entire length throughout the whole country*. Such a tax was held not to be forbidden by the Constitution because *based* on the company's stock representing only its business and its property inside the State." (Italics the court's.)

We submit, therefore, that there is no reasonable ground to conclude from anything the Court said in the Kansas case that the decision there reached may be construed as a precedent for condemning the Texas statute; but to the contrary, it may be assumed that had the Kansas statute been as carefully drafted as the Texas statute, the Court would have reached a different conclusion.

In the case of *James* v. *Dravo Construction Company*, 302 U. S. 134, 82 L. Ed. 155, the question for decision was stated by Mr. Chief Justice Hughes, as follows:

> "This case presents the question of the constitutional validity of a tax imposed by the State of West Virginia upon the gross receipts of respondent under contract with the United States."

The Court held that the State of West Virginia could lawfully levy a gross receipts tax upon the receipts from the business of the corporation transact-

ed in that State, but that such tax could not lawfully be laid upon its gross receipts with respect to the "work done" and business conducted by it in the State of Pennsylvania, and that "an apportionment was necessary to limit the tax accordingly."

A gross receipts tax, being an excise tax, necessarily bears some relation to a franchise tax which a state may lawfully lay upon a foreign corporation for its privilege of doing an intrastate business in the state; but it is a fallacious concept to confuse one tax with the other. They may be similar but they are not identical, and that was factually demonstrated by the statement of the West Virginia case, for the gross receipts tax laid by that State upon the Pennsylvania corporation was expressly said to be in addition to the franchise tax of that State. The distinction which ordinarily exists between the two kinds of taxes has frequently been recognized by the courts; and it is not thought necessary to pursue this particular discussion further than to say that it is believed that if the State of West Virginia in formulating its statute had provided that such such tax be laid upon that amount or portion of the gross receipts of the corporation as the receipts from its business in West Virginia bore to the gross receipts from its business from all sources, the statute would have been upheld by the Court in its entirety.

The case of *Hans Rees' Sons* v. *North Carolina ex rel Maxwell*, 283 U. S. 123, 75 L. Ed. 878, is distinguishable from the instant case in that there the subject involved was an income tax assessed by the tax-

ing authority of North Carolina against the appellant in that State. The cause arose by appellants making application to the State Commissioner of Revenue for a readjustment of the taxes that had been assessed against it for the several years in question. The statute of North Carolina provided in substance with respect to a foreign corporation that its net income taxable in that State should be measured by that proportion of its entire net income as the cash value of its real estate and tangible personal property in that State bore to the cash value of all its real estate and personal property.

The appellant was a New York corporation engaged in the business of tanning, manufacturing and selling leather goods. Its manufacturing plant was situated in North Carolina, but the sales of its manufactured products were made throughout the United States and Canada. The testimony offered by the appellant before the Commissioner showed that only about 20% of its entire income was earned from its business transactions in the State of North Carolina, whereas, by the application of the statutory formula, a tax of from 66% to 85% of the total income of the corporation from all sources was taxed by that State. Upon that state of facts the Supreme Court of the United States held that "The statutory method as applied to the appellants' business for the years in question operated unreasonably and arbitrarily in attributing to North Carolina a percentage of income out of all proportion to the business transacted by the appellants in that State."

It is thought that a state statute which provides for the assessment of an income tax upon a corporation doing both an intrastate and interstate business must be reasonably flexible in its operation, and that any statutory formula for laying the tax may not be used to assess a tax upon income which does not in fact exist in the taxing state. The ultimate fact to be determined in such a case is that amount of the taxpayer's income which flows from his business in the particular state, and upon that issue the taxpayer undoubtedly had the right to go into court and be heard. When, therefore, the amount of the intrastate income of the corporation has been judicially determined, the statutory ratio for assessing the tax may be applied.

A franchise tax or privilege tax proceeds from a somewhat different theory from that of an income tax, and while both capital and income of corporations may be, and usually are, taken into consideration by the State Legislature in enacting a statute, nevertheless the essential element considered and the subject of the tax, is the value of the privilege which the corporation enjoys at the hands of the State to do an intrastate business in that State.

It is believed that the case of *Alpha Portland Cement Company* v. *Massachusetts*, 268 U. S. 203, 69 L. Ed. 916, which is also cited by petitioner in support of its position, has no application whatever to the case at bar. In that case the facts were undisputed, and it was expressly admitted by the Attorney General that the cement company's business in the

State of Massachusetts was "exclusively" an interstate business. The Supreme Court in the course of its opinion took occasion to discuss some of the state formulas for laying an excise tax upon foreign corporations, and said: "Many methods adapted to that end have been accepted, but this does not tend to support an excise laid upon a foreign corporation on account of *interstate transactions*." (Italics ours.)

In the case of *Cudahy Packing Company v. Hinkle*, 278 U. S. 460, the Supreme Court condemned the franchise tax of the State of Washington. The statute of that State provided "that every corporation . ... required by law to file Articles of Incorporation in the office of Secretary of State, shall pay to the Secretary of State a filing fee in proportion to its authorized capital stock"; and which fee was graduated according to the amount of the capital. It was shown that the *issued stock* of the packing company was much less than its authorized capital stock.

The Court in its opinion followed *Looney* v. *Crane Company*, 245 U. S. 178, 62 L. Ed. 230, and held the taxing statute void as to the packing company, because it undertook to lay the tax according to a given percentage of the *entire authorized capital stock* of a foreign corporation doing both a local and interstate business, and that it thereby directly burdened interstate commerce and "exerted the taxing authority of the State over property and rights which were wholly beyond" the jurisdiction

of the State. It will be noted that the Washington statute is materially different in its language and conception from the present Texas statute; and it is also to be noted that the Court is now concerned with a very different Texas statute from that condemned by the Court in the Looney case.

In the case of *Hines* v. *Wallace*, 253 U. S. 66, 64 L. Ed. 782, the action was concerned with one certain section only of a special excise tax of the State of North Dakota, which section was applicable alone to railroads, telegraph companies, and other similar corporations. The section of that law there in question was contained in the following proviso:

> "Provided, that in the case of a railroad . . . having lines that enter into, extend out of, or across the State, property within the State shall be held to mean that proportion of the entire property of such corporation engaged in such business which its mileage within the State bears to its entire mileage within and without the State . . . "

It is common knowledge that the capital of a railroad company is only partially represented by the length of its trackage for, as stated by the Court in that case, the cost of construction of the railroad and its valuable terminals must necessarily be taken into consideration in any case in determining the value of the capital of the railroad. Furthermore, it was emphasized by the Court in its opinion that North Dakota is a State of plains, very different from other states and that the cost of its road there

was much less than it was in the mountainous regions of other states across which the road had to traverse; that North Dakota is mainly agricultural, and that its markets are outside its boundaries, and that most of its distributing centers are also outside the State. The Court said, "So, looking only to the physical track the injustice of assuming the value to be evenly distributed according to main track mileage is plain."

The Circuit Court of Appeals in deciding the case at bar drew a clear and substantial distinction between it and the Hines case wherein it said that the Supreme Court had held void only the exceptional phase of the Dakota statute "which put upon railroads a peculiar method of mileage apportionment of capital between the states in which they did business, which was thought arbitrary. Had the apportionment for railroads been like to that for other corporations, on the basis of business done, as here, we apprehend the result would have been otherwise."

In the case of *Fargo* v. *Hart*, 193 U. S. 490, 48 L. Ed. 761, the Supreme Court had before it for review a statute of the State of Indiana which undertook to levy a direct tax upon the property of corporations doing both intrastate and interstate business. The court defined the tax as follows: "The tax is a tax on property, *not on the privilege of doing business*, but it is intended to reach the intangible value added to what we have called the

organic relation of the property in the State to the whole system." (Italics ours.)

It was shown on the hearing before the State Board of Tax Commissioners of that State that only a small proportion of the tangible property of the Fargo Express Company was situated in the State of Indiana, but that it had at the taxing date approximately $17,000,000.00 of property situated in other states which was not used in its business, and about four and one-half million dollars of property which was used in its business of which there was less than $800,000.00 worth situated in Indiana. Several other factual elements appear to have been taken into consideration by the Court which provoked the Court to hold that the taxing board of Indiana did take into account property which it had no right to consider "in fixing the assessment at the large sum which we have mentioned."

Whatever difference of opinion may exist in the legal mind with respect to the argument and conclusion reached by the Court in that case—and this is said in view of the fact that Mr. Chief Justice Fuller, Mr. Justice Drew and Mr. Justice Day dissented—it is submitted that both the standard fixed by the Indiana statute for laying the tax and the kind of tax there under consideration clearly distinguish that case from the present case.

There are a few cases cited by the petitioner in its brief to this Court which we do not review for the reason that it is believed that they either have

no possible bearing upon the merits of this case, or that they were cited merely to be distinguished as being of no authority in support of the respondent's position.

II.

The Texas statute in question is a non-discriminatory franchise tax, which is both constitutional and reasonable in its terms. It does not, as applied to petitioner, levy a tax on property outside the State or burden interstate commerce within the meaning of the Constitution, and the tax levied against petitioner is not arbitrary but is a reasonable tax for the privilege of petitioner exercising its business in this State for one year.

In the case of *Southern Realty Corporation, et al.*, v. *McCallum, Secretary of State*, reported in 65 Fed. (2d) 734, the statute under consideration was attacked by a number of corporations which sought to restrain the Secretary of State from enforcing the statute in question on the ground that it conflicted with the commerce clause of the Federal Constitution "and due process and equal protection clauses of the Fourteenth Amendment." Several special allegations were made in the bill in that case which petitioners said led to those conclusions.

Both the District Court and the Circuit Court of Appeals held that the statute was immune from all such attacks, and that the law was in all respects

valid and enforceable according to its provisions, with the possible exception of one administrative feature, which was adverted to by the Circuit Court of Appeals and which was held to be severable, and, therefore, immaterial. Certiorari was denied. 290 U. S. 692, 78 L. Ed. 695.

While the Supreme Court of Texas has written no opinion on this statute, nevertheless it has been approved by that Court, as against the attack made on it and the tax levied thereunder, in the case of *United North & South Development Co.* v. *Heath, Secretary of State.* In that case the petitioner, a Delaware Corporation doing business in Texas under a lawful permit, made its report in accordance with the statute to the Secretary of State, and in which it was claimed that the franchise tax for the year involved amounted to $941.41, and which amount the corporation tendered with its report. The tendered amount was refused as in satisfaction of the tax, for the reason that under the statute the tax amounted to $8,117.40. Payment of the tax was refused, and the Secretary of State added 25% penalty to the tax. The corporation thereupon sought a permanent injunction against the Secretary of State to restrain the collection of the tax. The injunction was refused by the District Court, from which an appeal was taken to one of the Courts of Civil Appeals of Texas which resulted in that Court affirming the judgment of the District Court as shown in the opinion reported in 78 S. W. (2d) 650. The appellant applied for a Writ of Error to the Supreme Court of Texas, which writ was denied.

We quote briefly from the opinion of the Court of Civil Appeals:

"* * * This amendment—(speaking of the present statute)—but evinces a legislative intent to reckon the amount of the tax to be charged in proportion to the value of the privilege granted. As was stated by the Supreme Court of Missouri in State ex rel. Marquette Hotel Inv. v. State Tax Com., supra: 'Franchise taxes, to be fair, should be measured by the volume of business. The volume can best be measured by the property used in the business.'

"Since such tax is payable in advance, the state may, in computing such tax, look to the property owned by the corporation and available to it, for use during the ensuing year in carrying on its business. Such was clearly, we think, the legislative intent. * * *

"It follows, therefore, that the tax demanded of appellant was not one arbitrarily fixed by the Secretary of State, nor contrary to the holding of the court in Southern Realty Corporation v. McCallum, supra. Nor was it undertaken to be assessed by the Secretary of State. *'It was fixed by statute, and the only thing the Secretary of State did was to compute the amount of such tax from the information furnished him by appellant itself in its sworn report filed in his office.*" (Italics ours.)

The refusal of the writ of error by the Supreme Court in that case, by virtue of Article 1728, Revised Civil Statutes of Texas, 1925, as amended by the Fortieth Legislature, constituted an approval by

the Supreme Court of the decision of the Court of Civil Appeals. This statute in part provides: "In all cases where the judgment of the Court of Civil Appeals is a correct one, and where the principles of law declared in the opinion of the Court are correctly determined, the Supreme Court shall refuse the application." The statute was so construed by the Supreme Court in *Hamilton* v. *Empire Gas & Fuel Company*, 110 S. W. (2d) 561, at page 565.

It is, therefore, submitted that the validity, that is to say, the constitutionality, of the Texas franchise statute is not now, if it ever was, a debatable question, for that matter has been determined in favor of the State by the decisions of both the State and Federal courts, at least as to its applicability to corporations, in general.

We think, also, that every substantial allegation made by petitioner against the statute and the tax levied thereunder, as related to the claimed peculiar situation of the Ford Motor Comapny, has been determined against it by those courts, especially so by the decision in the Southern Realty Company case. Petitioner thinks and contends otherwise, althouh it concedes, to quote from its Brief, that, "Plainly, Texas has adopted a formula which, when applied to many unitary corporations conducting activities in several states, will fairly apportion capital between states." Petitioner precisely states its position in the following language, also taken from its Brief, viz: "The question here is not the right of Texas to apportion capital on some fair basis. It

is, rather, does the statute as applied to one situated as petitioner, actually carry out the legislative scheme of taxation within permissible limits."

Therefore, stated in another way, and from respondents' point of view, the question now before the Court appears to be, has the petitioner succeeded in removing the burden which it has logically and necessarily assumed; that is to say, has the petitioner made a paper case for itself by any substantial fact allegation contained in its petition, whereby the court must conclude that petitioner should be exempt from the operation of the Texas franchise tax law—which admittedly bears fairly upon unitary corporations, in general—and that as to the petitioner the law must be held void as being in violation of the Federal Constitution.

Respondents respectfully submit that the plaintiff's petition fails to state a case in respect both as to those facts which if alleged, as well as to what it failed to allege.

The appellant's real contention, as stated by the Circuit Court of Appeals is, "that because it both manufactures and sells automobiles, the principal manufacturing activity and the capital necessary for it being in Michigan, gross income from sales is an arbitrary basis of apportionment in its case; and because the proportion of its capital investments located in Texas is far less than the proportion of its income there received, there is in effect a taxing of investments outside that State; and since the capital and investments outside the State are used

largely in interstate business there is a burden on interstate commerce."

The Circuit Court's analysis of this contention and its consequent denial of same are thought by the respondents to be convincing and irrebuttable. Also it is submitted that a similar charge against the New York franchise statute and the tax assessed thereunder was set aside by the Supreme Court in the following case, that is to say:

In the case of *People ex rel. Bass* v. *Tax Commissioner*, 266 U. S. 271, 69 L. Ed. 282, it appeared that the Bass Corporation was engaged in selling ale, that all of its brewing was done, and the larger part of its sales were made, in England, but that it formerly imported a portion of its product into the United States, which it sold through branch offices located in New York City and in Chicago. The statute provided that for the privilege of doing business in that State, a foreign corporation circumstanced as the complainant was should pay in advance an annual franchise tax to be computed at a certain percentum upon that portion of its ascertained net income as was determined by the proportion which the aggregate value of specified classes of assets of the corporation within the State bore to the aggregate of all such classes of assets wherever located.

It was contended by the Bass Corporation that the tax was based, not upon any net income derived from its business in New York, but upon a

portion of such income derived from business carried on outside the United States, which, under the provisions of the statute had been arbitrarily allocated to the New York business, and that the imposition of such tax deprived it of its property in violation of the due process clause of the Fourteenth Amendment, and imposed a direct burden upon its foreign commerce in violation of the commerce clause of the Constitution.

The Court, after holding that the tax was "primarily a tax levied for the privilege of doing business within the State," and that it was not a direct tax upon the allocated income of the corporation in any given year, held that the question of constitutionality of the tax was similar in its essential aspects to that held constitutional in *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, 65 L. Ed. 165. And with respect to the fact contention of the complainant, the Court said that inasmuch "as the company carried on a unitary business of manufacturing and selling ale, in which its profits were earned by a series of transactions, *beginning with the manufacture in England and ending in sales in New York and other places*—the process of manufacturing resulting in no profits until it ends in sales—the state was justified in attributing to New York a just proportion of the profits earned by the company from such unitary business." (Italics ours.)

It is alleged by the petitioner that the Texas statutory method of assessing the franchise tax

is as to it arbitrary, unreasonable, whimsical and capricious, all of which is connected with its further charge that the allocating and apportioning to Texas slightly in excess of $23,000,000,00 of the capital set-up of the Ford Motor Company, when the actual net book value of its invested assets in Texas was approximately only $3,000,000.00, is legally insupportable, and that as far as the State could legally go in assessing the tax would be to base the ratio determined by the statutory method upon the single amount of its invested capital in Texas. While according to the statutory formula there was attributed to Texas for the purpose of laying the tax the approximate sum of $23,000,000.00 of such capital, it is shown by the petition that the business done in Texas by the corporation in the preceding year exceeded $34,000,000.00, which was 3.85% plus of the total business done by plaintiff, that total business amounting to more than $888,000,000.00. It is also shown by said petition that the total franchise tax assessed against the Ford Motor Company when computed according to the statutory formula for the year in question was approximately $7,200.00. So it is seen that the tax as precisely determined represents only two ten-thousands of one per cent (.0002%) of the total gross receipts of the corporation for such year.

If is believed that the comparatively insignificant amount of this tax demonstrates that the petitioner's charge that the tax is arbitrary, whimsical, unreasonable and capricious, is fallacious, and that, there-

fore, the complete answer to petitioner's contention is found in plaintiff's petition.

On a similar charge to that of petitioner, but based upon sounder reasons than those alleged by the petitioner, this Court in the Bass case, supra, held that the tax there assessed according to the ratio of the segregated assets of the corporation located in New York and elsewhere, was not inherently arbitrary, and that it was not a "mere effort to reach profits earned elsewhere, under the guise of legitimate taxation." It was further held by the Court in that case as a matter of fact, that the complainant there failed to deduce any evidence that would justify the Court in holding that the tax levied was, as applied to the petitioner, unreasonable, the Court saying: "It is not shown in the present case any more than in the Underwood case, that this application of the statutory method of apportionment has produced an unreasonable result. The fact that the company may not have had any net income upon which it was subject to payment of income tax to the Federal government—(which fact was shown) —obviously does not show that it received no net income from the business which it carried on in New York."

There is no pretense of a showing upon the part of the petitioner in this case, as deduced from anything said in its petition, that the intrastate business of the Ford Motor Company, which amounted to more than $34,000,000.00 in the previous year, when considered in connection with the approximately

$23,000,000.00 of the capital allocated to Texas, did not upon that basis produce any profit for the company. The natural inference is to the contrary. So, we think that the remarks of the Circuit Court of Appeals in this case were definitely applicable when it said, in substance, that the object of the corporation being to make money, and that no money can be made until it sells its manufactured products, that if it chooses to sell in Texas, "and extracts cash from Texas, with the great advantage that manufacturing its own wares gives in competition with those who do not manufacture, it is not unreasonable to regard the potency of the capital used in the manufacture as following proportionately the goods offered for sale in Texas." And, further, it must be remembered that in this case a part of the manufacturing of petitioner's products occurred in Texas.

The Court further said, in substance, that if it were practicable to separate the manufacturing from the selling activities of the corporation, elsewhere, and the manufacturing activities in Texas from those elsewhere, plaintiff's petition afforded "no data to do it." See 100 Fed. (2d) 517.

Respondents cite the case of *Norfolk, etc. R. R. Company* v. *North Carolina*, 297 U. S. 682, L. Ed. 977, as authority in favor of their position in general, but especially with respect to plaintiff's contention that the Texas statute is void as to it, because of the circumstances as relates to the value of its manufacturing plant and assets in Michigan.

No fact is alleged by petitioner with respect to that situation than that the major portion of its capital structure is situated in that State, and from that the petitioner deduces as a legal conclusion that the portion of capital allocated to Texas business for the computation of the tax is excessive and, therefore, is sufficient of itself to condemn the statute.

The question about which the Court was concerned in the cited case was an income tax enacted by the North Carolina statute, as related to interstate railway companies, and which was laid according to the method or formula as defined in the statute. Gross revenue and operating expenses within and without the State, as well as the mileage of such corporation, were all taken into consideration. It is not necessary to give an accurate definition of that statute. The Norfolk Railroad Company contended the tax as laid against it was void for the reason that the operating expenses for its North Carolina branches were far in excess of those allowed by the State Commissioner, who had refused to depart from the statutory formula in a hearing before him upon this tax. The Supreme Court in its opinion said there was evidence to support the position of the Railroad Company, but that if it be accepted as fact, the result would not invalidate the tax, because such higher cost could well be attributed to the mountainous terrain and the low density of traffic, as well as to other causes; *that the railway company took upon itself the burden of making out a case for the rejection of the statutory formula,*

and having gone no further than to prove the single fact stated, that fact was not sufficient to overturn the tax.

The Court further held that it was unable to accept the argument of the Railroad Company that its burden was discharged when it gave evidence of the ratio between actual and average expenses *while keeping silent as to the ratio between actual and average receipts*, and as to which the Court said: "The statutory formula is not framed on an assumption that gross operating revenues are uniform actually for every mile throughout the system. It is not framed on an assumption that for every mile of the system there is uniformity of expense. Such assumptions, if made, would be contrary to notorious facts. * * * *The implications of the formula being what they are, a taxpayer does not escape the application of the statute by evidence directed to only one of its related terms.* Its evidence, to be effective, must be directed to each of them alike, for only thus can the assumed relation between them be proved to be unreal. This taxpayer disclaims the duty and even the endeavor to respond to such a test. *It varies the numerator of the fraction while accepting the denominator.*" (Italics ours.)

The Court took occasion to say, in passing upon the case, that it did not assume that the State income tax might not have been apportioned by a method more accurate, but that of itself was an insufficient reason for declaring the statute void.

In the case of *Educational Film Corporation* v. *Ward*, 282 U. S. 279, 75 L. Ed. 400, the Court had before it the question of the validity of the franchise tax of the State of New York, and which it upheld against very similar charges to those contained in plaintiff's petition here. In passing upon the case, the Court said that it was plain that a franchise tax can have no application independent of the corporation's enjoyment of the privilege of exercising its franchise in the State, and that under the Constitution "the privilege of exercising a corporate franchise is the legitimate object * * * of the State's power to tax." And in discussing that power of the State in connection with the immunities of which a taxpayer may avail himself under the Federal Constitution to escape a state tax, the Court said: "This Court in drawing the line which defines the limits of the powers and immunities of state and national governments, is not intent upon a *mechanical application of the rule that government instrumentalities are immune from taxation, regardless of the consequences to the operations of government.* The necessity for marking those boundaries grows out of our constitutional system, under which both the federal and state governments exercise their authority over one people within the territorial limits of the same state. *The purpose is the preservation to each government, within its own sphere, of the freedom to carry on those affairs committed to it by the Constitution without undue interference by the other.*" (Italics ours.)

Similar in effect to the above cited case is that of

People v. *Latrobe*, 279 U. S. 429, 73 L. Ed. 766, 65 A. L. R. 1341, in which the Court upheld a privilege tax enacted by the State of New York, which, in substance, is very similar to the Texas statute. The New York statute imposed on every foreign corporation doing business in that State "a tax computed upon the basis of capital stock employed by it within the state during the first year it does business there; the amount of its stock so employed by that proportion of its total *issued capital stock* which its gross assets employed within the State bears to its gross assets wherever employed."

The trial court, on the theory that the tax, as applied to the corporation, was not an admission tax imposed as a condition to its entrance into the State, held that the corporation could invoke the equal protection clauses of the Federal Constitution, and that the tax was void because it was in violation of the equal protection clause of the Constitution. The trial court based its decision upon the case of *Air-Way Electric Appliance Corp.* v. *Day*, 266 U. S. 71.

The Supreme Court said that it was not necessary to determine whether the tax there in question might be sustained because it was imposed as an entrance fee, for assuming that the corporation was already within the State, and thus entitled to equal protection, the tax was not "so unreasonable or discriminatory as to deprive the corporation of any constitutional immunity." The Court distinguished that case from the Air-Way case, and in doing so said that

it was carefully pointed out by the Court in the Air-Way case that the tax there under consideration "was computed upon the authorized shares of such a corporation, whether or not subscribed for or issued, and so had no relation to the value of the privilege exercised by the foreign corporation within the State, and was not a reasonable measure of the tax imposed upon such a privilege." The Court cited the case of *Roberts & S. Co.* v. *Emmerson*, 271 U. S. 50, 70 L. Ed 827, which also distinguished the decision in the Air-Way case, and in that case it was said: "The authority to issue its capital stock was the privilege conferred by another State and bore no relation to any franchise granted to it by the State of Ohio or to its business and property within that State. When authorized capital stock is taken as the basis of the tax, variations in the amount of the tax are obtained, according as the corporation has a large or small amount of unissued capital stock"; and that this, as decided in the Air-Way case, resulted in a tax larger than taxes imposed on other corporations for like business and property within the State. The natural consequence of which made the tax discriminatory and in violation of the equal protection clause of the Constitution. The Court further said in the Latrobe case: "There is no complaint of discrimination between foreign and domestic corporations, and no attempt to tax property outside the state, since the tax is apportioned to the property used within it. * * * A state which has adopted a permissible scheme of franchise tax for domestic corporations, based on capital stock (*Rob-*

erts & S. Co. v. *Emmerson*, supra), has a legitimate interest in imposing a like burden on foreign corporations which it permits to carry on business there, and we can perceive no constitutional objection to its protecting that interest by such a tax where, as here, it is limited to shares actually issued, is not assailed as confiscatory, does not reach either directly or indirectly property beyond the state and does not discriminate between foreign and domestic corporations, or between foreign corporations of like organization and property.

"There is nothing in the Constitution which requires a state to adopt the best possible system of taxation. * * * Although permissible, a franchise tax need not be based solely on the amount of business done or property owned within the state. It may be rested on the nature of the business." (Citing many cases).

Respondents think that the decision of the Court in the Latrobe case negatives every proposition urged by petitioner against the Texas statute. Before concluding, however, we notice again briefly petitioner's charge that the tax levied in the instant case imposes a direct burden upon petitioner's business in interstate commerce.

We submit that petitioner alleges no facts showing a burden on interstate commerce. It will be repeated that this is a franchise tax laid solely upon the privilege of doing intrastate business. The total of all business, intrastate, interstate and foreign,

must necessarily be considered as being incidentally concerned with the amount of petitioner's Texas intrastate business in order to determine the percentage allocated to Texas. Thus, interstate business is considered in a manner which will reduce such percentage, rather than increase it. And the Secretary of State took petitioner's own figures as to the Texas intrastate business, $34,272,887.72, as well as the whole of petitioner's business, $888,334,775.47. It has been so often decided by the courts as to become elementary that the fact that the Ford Motor Company may do some foreign and interstate commerce business does not mean that it shall not be subject to any State franchise tax which considers as one element the total amount of the business done by the corporation as related to the total amount of its intrastate business, for, to say the least, in such case interstate commerce is burdened, if at all, in an incidental or indirect way by the tax.

In the case of *International Shoe Co.* v. *Shartell*, 279 U. S. 429, 73 L. Ed. 785, this Court had before it for consideration the Missouri Franchise Statute. Without quoting that statute, it is submitted that it is believed to be substantially similar in its provisions to the Texas statute. In that case the charge was made by the plaintiff corporation that the tax unduly burdened interstate commerce, and was, therefore, void. We quote from the Court's opinion as follows: "The mere fact that the corporation is engaged in interstate commerce does not relieve it of local tax burdens in respect of its property within the state or its intrastate business. . . .

Appellant does a substantial amount of local commerce. A franchise tax imposed on a corporation, foreign or domestic, for the privilege of doing a local business, if apportioned to business done or property owned within the state, is not invalid under the commerce clause merely because a part of the property or capital included in computing the tax is used by it in interstate commerce." (Citing many authorities.) * * * "The tax is distinguishable from those considered in *Air-Way Electric Appliance Corp.* v. *Day*, supra, and *Looney* v. *Crane*, 245 U. S. 178, 62 L. Ed. 230, and *Cudahy Packing Co.* v. *Hinkle*, 278 U. S. 460, *which either were measured by authorized instead of issued capital stock, or were not limited to the part of the capital stock justly apportioned to the taxing state.*"

Additional authorities:

Atlantic & Pacific Tea Co. v. Grosjean, 301 U. S. 410, 81 L. Ed. 1193
Atlantic Refining Co. v. Virginia, 302 U. S. 22
Crude Oil Co. v. Yount-Lee Oil Co., 122 Tex. 21, 52 S. W. (2d) 56
Delaware Railfoad Tax Case, 85 U. S. , 18 Wall. 206
Home Insurance Co. v. New York, 134 U. S. 594, 34 L. Ed. 1025
Roberts & Co. v. Emmerson, 271 U. S. 50, 70 L. Ed. 827, 49 A. L. R. 1495
Southwestern Oil Co. v. Texas, 217 U. S. 114

The State of Texas levies no income tax on corporations or others.

The franchise tax, as enacted into the laws of the State of Texas, bears inherent evidence that it was carefully and intelligently conceived, so as to bear equally as nearly as possible upon all corporations according to the value of their business potency while exercising the privilege of carrying on their business within the State.

In enacting the law it is believed that the State of Texas acted within constitutional limits and under its measured sovereign capacity, for the purpose of raising revenue for the support of the State government. Under this State government the petitioner has police protection within its whole territorial limits. The petitioner desires to exploit its business and to make money while doing an intrastate business within the State, but petitioner has assumed to define its own terms and the amount of tax which it chooses to pay for that privilege. This position of the petitioner is insupportable and disregards the duty of the State to legislate in such way as to preserve equality with respect to all corporations, both foreign and domestic, doing business within the State.

It is submitted that the statute is not subject to the constitutional objections urged against it and that the tax levied thereunder against the petitioner is neither discriminatory nor unreasonable.

WHEREFORE, respondents pray that the judgment of the Circuit Court of Appeals, and that of the Dis-

trict Court be in all things affirmed, and for general relief.

Respectfully submitted,

GERALD C. MANN,
Attorney General of Texas

GLENN R. LEWIS,
Assistant Attorney General

W. F. MOORE,
First Assistant Attorney General

Attorneys for Respondents.

The attorneys for Petitioner, Ford Motor Company, are: Gaius G. Gannon and Baker, Botts, Andrews & Wharton of Houston, Texas.